IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BAILEY	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
UNITED AIRLINES	**:**	
Defendant.	**:**	**NO. 97-5223**

M E M O R A N D U M

Reed, S.J. **June 26, 2002**

Plaintiff James Bailey ("Bailey") filed this lawsuit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., alleging that he was terminated from his position with United Airlines, Inc. ("United") because of his age. This Court previously granted summary judgment in favor of United, concluding that Bailey's claim was time barred. The Court of Appeals for the Third Circuit reversed that decision and remanded the action to this Court for further proceedings. This Court now addresses the remaining arguments originally presented in the renewed motion of United for summary judgment (Document No. 33), pursuant to Rule 56 of the Federal Rules of Civil Procedure, as well as the response, reply and four supplemental briefs thereto. For the following reasons, the motion will be granted.[1]

I. Background[2]

For most of his career as a commercial airline pilot, Baily worked for Pan American World Airways ("Pan Am"). In 1991, after Pan Am declared bankruptcy, United purchased certain of Pan Am's South American routes. As part of that purchase, United agreed to hire a

[1] Because this case raises a federal question, jurisdiction is proper pursuant to 28 U.S.C. § 1331.

[2] The facts laid out in this opinion are based on the evidence of record viewed in the light most favorable to the plaintiff James Bailey, the nonmoving party, as required when considering a motion for summary judgment. See Carnegie Melon University v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997).

number of former Pan Am employees to operate those particular routes without requiring them to be subjected to a physical examination. As a result, Bailey was invited to seek employment with United. Bailey was 59 years old when United hired him in October of 1992. Based upon his seniority, Bailey was able to bid for a first officer (co-pilot) position. To fly as a first officer for United, Bailey was required to pass United's first officer training. He passed the training in November of 1992.

Bailey turned sixty years old on March 5, 1993, approximately four months after completing his first officer training at United. Federal Aviation Regulations provide that "[n]o person may serve as a pilot on an airplane . . . if that person has reached his 60th birthday." 14 C.F.R. § 121.383(c). Accordingly, United notified Bailey that he was no longer qualified to work as a first officer. Bailey was, however, given the opportunity to bid for a position as a second officer or flight engineer, a non-flying position, upon the successful completion of the transition training required by United. Bailey had good reason to believe that he could continue his career as a second officer. During the years 1992-1997, 577 out of 584, approximately ninety-nine percent (99%), of United pilots who turned sixty and sought to continue with United as second officers satisfactorily completed second officer training. (Def.'s Ex. 22, Def.'s Answers and Objections to Interrogs. ¶ 6.)

The second officer training is a multi-week training consisting of a combination of ground school classroom work and participation in aircraft simulator periods. (Def.'s Ex. 4, DC-10 Transition Training Schedule.) After a DC-10 probationary second officer candidate completes this preliminary training, he or she takes both an oral and written exam, as well as a simulator "check ride" which is the final test designed to present the candidate with various real-life flying conditions. When a candidate fails a certification check, requires excessive additional

training, or appears unsuitable for employment, a Board of Review ("Board") is convened to consider what remedial action, up to and including discharge of the candidate, should be taken. (Def.'s Ex. 5, Flight Center Policy.) This procedure was explained to Bailey who signed an acknowledgment thereto. (Def.'s Ex. 6, Plaintiff's signed acknowledgment of policy.)

Bailey began the probationary second officer training in April of 1993. It is the result of this training which serves as the basis for this lawsuit. United takes the position that Bailey performed poorly during the training period and on April 30, 1993 failed his simulator "check ride." As a result, a Board of Review convened and determined that Bailey would be discharged. Bailey essentially takes the position that suspicious documents in his employee file, as well as conflicting deposition testimony, raise triable issues as to whether Bailey's discharge was due to his age and not his performance during the training period. Bailey contends that similarly situated employees were offered additional training sessions which should have been made available to him, and that United's ageist discrimination is further evidenced by employees using terms like "herpes" to refer to older employees.

II. Legal Standard

In deciding a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the "test is whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Furthermore, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." Id. at 250.

On a motion for summary judgment, the facts should be reviewed in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 176 (1962)). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita, 475 U.S. at 586, and must produce more than a "mere scintilla" of evidence to demonstrate a genuine issue of material fact and avoid summary judgment, see Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Analysis

Plaintiff claims defendant intentionally discriminated against him because of his age in violation of the ADEA. Bailey may sustain his claim by presenting direct evidence of age discrimination or by using circumstantial evidence that would allow a reasonable factfinder to infer intentional discrimination. See Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 n. 4 (3d Cir. 1995). In the absence of direct evidence of discrimination, as is the case here, a plaintiff may proceed under the burden shifting paradigm of McDonnell Douglas and its progeny. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); McDonnell Douglas Corp., v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 643-44 (3d Cir. 1998). See also Marzano v. Computer Science Corp., Inc., 91 F.3d 497, 503 n.2 (3d Cir. 1996) (burden-shifting analysis under Title VII and ADEA are identical).

To survive summary judgment, the plaintiff must first prove by a preponderance of the evidence that a *prima facie* case of discrimination exists. See Reeves v. Sanderson Plumbing

Prod., 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000); Stanziale v. Jargowsky, 200 F.3d 101, 105 (3d Cir. 2000). To establish a *prima facie* case, Bailey must show that (1) he is in a protected class, i.e., that he was over forty, (2) is qualified for the position, (3) suffered an adverse employment action, and (4) was discharged under circumstances that give rise to an inference of unlawful discrimination. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163, 167 (3d Cir. 2001); Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 357 (3d Cir. 1999); Waldron v. SL Indus., Inc., 56 F.3d 491, 494 (3d Cir. 1995). Common circumstances giving rise to an inference of unlawful discrimination include the hiring of someone not in the protected class as a replacement or the more favorable treatment of similarly situated colleagues outside of the relevant class. See Bullock v. Children's Hosp. of Philadelphia, 71 F. Supp. 2d 482, 487 (E.D. Pa. 1999).

While a plaintiff *may* make out a *prima facie* case with evidence that similarly situated individuals were treated more favorably, as the Court of Appeals clarified, however, such proof is not required. See Pivirotto, 191 F.3d at 356-57. A plaintiff can make out a *prima facie* case even without demonstrating that employees outside of the relevant class were treated more favorably, let alone that the plaintiff was replaced by someone outside of the relevant class. See id. at 357;Matczak v. Frankford Candy and Chocolate Co. , 136 F.3d 933, 938 (3d Cir. 1997); Bullock, 71 F. Supp. 2d at 489. There is no rigid formulation of a *prima facie* case, and the requirement may vary with "'differing factual situations.'" Matczak, 136 F.3d at 938 (quoting McDonnell Douglas, 411 U.S. at 802 n.13). The *prima facie* case requires "only 'evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion.'" See Pivirotto, 191 F.3d at 356 (quoting O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (1996)).

Nevertheless, the plaintiff must ultimately prove by a preponderance of the evidence that a *prima facie* case of discrimination exists. See Bullock, 71 F. Supp. 2d at 490. Demonstrating only a mere possibility of discrimination will not suffice. See id.

After the plaintiff has proven a *prima facie* case, the burden of going forward shifts to the defendant to produce a legitimate, nondiscriminatory reason for the termination. See Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 522 (3d Cir. 1992). After a legitimate, nondiscriminatory reason is provided, the burden of going forward shifts back to the plaintiff to prove that the proffered reason is a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 802;Ezold 983 F.2d at 522. In order to prove pretext, the plaintiff must provide either direct or circumstantial evidence from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons or (2) believe that a discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. See Fuentes, 32 F.3d at 764 (citing Hicks, 509 U.S. at 511; Ezold, 983 F.2d at 521-522). In order to prove this, the plaintiff "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" Fuentes, 32 F.3d at 765 (quoting Ezold, 983 F.2d at 531). "[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." Id.

Defendant does not dispute that Bailey is a member of a protected class and that he suffered adverse employment action when he was terminated. United argues that plaintiff cannot make out a *prima facie* case because he cannot establish that he was qualified for a position as a Second Officer at United, and he fails to adduce evidence showing that he was terminated under

circumstances that gave rise to an inference of discrimination. Defendant alternatively argues that even if Bailey could prove a *prima facie* case, he produces no evidence showing that United's legitimate reasons for terminating plaintiff were a pretext for discrimination. Bailey contends that genuine issues of material fact exists as to each element of the burden-shifting paradigm. For the sole purpose of efficiency in adjudicating this motion, this Court will assume that Bailey makes out a *prima facie* case, and I will thus analyze whether he has raised a genuine issue of material fact as to whether United's stated reasons for terminating plaintiff are pretextual.[3]

Bailey's first argument essentially attacks the state of his employment file in an attempt to raise an inference that United's proffered reason for discharging is not worthy of belief. To begin, Bailey challenges the authenticity of a training evaluation by James Grimm which is dated April 16, 1993. Plaintiff contends that the true evaluation was "secreted," and that a subsequently fabricated evaluation was used as a reason to discharge plaintiff.[4] The evaluation offered by United rates Bailey's technical ability as 2-- "needs improvement." (Pl.'s Ex. 18; Def.'s Ex. 7.) Grimm also commented that Bailey was "not able to perform cockpit setup or SOPs [standard operating procedures]." (Id.) Bailey has submitted a different evaluation form also dated April 16, 1993, and signed by Grimm. (Pl.'s Ex. 19.) At his deposition, Grimm first denied that he completed any evaluation other than the one in Bailey's personnel file. (Pl.'s Ex. 13, Deposition Testimony of James Grimm at 22.) However, he conceded that another evaluation form existed when confronted with a copy of a "secreted" evaluation. (Id. at 22-23.)

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[3] I note, however, that I harbor great doubt that plaintiff would be able to make out even a *prima facie* case at trial if this suit were to go forward.

[4] In an Order dated October 25, 1999, Magistrate Judge Angell, having held a hearing, ruled that Bailey failed to make out a *prima facie* case of evidence tampering by United.

Nevertheless, United points out that both evaluations rated Bailey's technical ability as "needs improvement." The only apparent discrepancy between the two evaluations is the comment: the "secreted" evaluation reads: "performance of normal SOP is done with uncertainty and slowness which led to items not be [sic] completed." (Pl.'s Ex. 19.)

Bailey argues that this difference is significant because the allegedly falsified evaluation "seems to be the single strongest evidence in favor of United's termination of plaintiff." (Pl.'s Mem. in Opp'n at 29.) To the contrary, however, United did not base its decision on one evaluation; rather, it looked at the whole of Bailey's training and in particular the fact that he had failed his check ride. (Def.'s Ex. 12, Board of Review Notes by Des Payne dated July 14, 1993; Def.'s Ex. 13, Deposition Testimony of Des Payne ("Payne Dep.") at 63.; Def.'s Ex. 3, Dec. of Eric Clethen ¶¶14-19.) Thus, even when the document is viewed in the light most favorable to Bailey, the record still indicates that Bailey received a rating of "2" and needed improvement in performing SOPs.

Bailey next questions whether a Board of Review was ever held, arguing that the decision to fire him was made without a Board of Review and alleging that a false record of the meeting was created after the fact. In support of his position, Bailey relies primarily on (1) the fact that United's submitted record of notes from the Board of Review were not written until July 14, 1993, more than two months after the Board met, (Def.'s Ex. 12), (2) an unsigned version of Board notes, (Pl.'s Ex. 16), (3) discrepancies in the deposition testimony of various Board members regarding such specifics as where the Board of Review meeting occurred, (4) and the state of Plaintiff's file as compared to other United employees. Bailey appears to argue that a reasonable jury could find that these four circumstances demonstrate that United created a justification for discharging him after the fact and that the real reason Bailey was fired was

because of his age. United maintains that a Board of Review was in fact held on May 4, 1993, shortly after Bailey failed his check ride, and it was decided at that time that Bailey would be terminated because of his overall performance during his probationary training period.

The July 14th notes were written by Des Payne, the Flight Manager of Standards, and include a review of Bailey's training progress. Payne writes that in ground school, plaintiff was "slow to learn SOP;" in the System/SOP Review and Closed Book exam, Bailey 's "SOPs were weak;" his simulator was evaluated as "below standard" in the areas of "Engine Start and Push Back SOP" and "Starting Irregularities." (Id.) Payne noted that at the end of "the normal syllabus," Bailey was not recommended for his check ride because a "continuing problem existed in the completion of written irregular/ emergency checklists." (Id.) Plaintiff was authorized for two additional periods, after which he was permitted to take his check ride. (Id.) His simulator check was unsatisfactory because of "Engine Starting Malfunctions" and "Pneumatic System Malfunctions." (Id.) It was reported that he would need two additional simulator periods to attain the required proficiency. (Id.)

In reviewing the comment that Bailey needed additional training, the Board determined that success with these additional trainings assumed "normal" progress, and there was concern that Bailey would not make "normal" progress. (Id.) The Board concluded that "the engine irregularity problem areas identified on the simulator check had also been identified during period 4 and special attention had been given in these areas during periods 5, 6, 7, and 8." (Id.) Thus the Board was of the opinion that Bailey's progress would not be "normal" and as a result no additional training could be offered and rather his employment would be terminated. (Id.) Payne's deposition testimony was consistent with the findings in his summary. (Def.'s Ex. 13, Payne Dep. at 63.) He further testified that Eric Clethen, the New Hire Coordinator, requested

that he write the summary of his notes. (Id. at 10.)

In further support of his argument that no Board of Review occurred, Bailey submits an unsigned Board of Review notes which seem to have been written on May 6, 1993. (Pl.'s Ex. 16.) Bailey contends that the documents relating to his Board of Review, which include the unsigned document and the late dated Payne document, stand in contrast to the files of other United employees. Bailey specifically relies on four such employee files and contends that in each one, a signed Board report summary was conducted shortly after the Review and clearly indicated which members sat on the Review, their titles, and the date and time of the meeting. (Def.'s Ex. 21(a), (c), (d).)

Bailey argues that in contrast, the members of his alleged Board of Review disagreed over the mechanics of how the decision was made: William Traub, a member of the Board, testified that each member's opinion was polled, while William Yantiss, also a member of the Board, testified that no voting occurred. (Pl.'s Ex. 3, Deposition Testimony of William H. Traub ("Traub Dep.") at 28-29; Pl.'s Ex. 4, Deposition Testimony of William E. Yantiss ("Yantiss Dep.") at 22.) However, while Yantiss testified that no vote took place, he also testified that the decision "was a consensus." (Pl.'s Ex. 4, Yantiss Dep. at 22.) Bailey also finds significant the fact that deponents disagreed over the location of the meeting, as well as over who took part in the meeting: Payne testified that the meeting was held in Captain Traub's office with Payne present, while Yantiss testified that it took place in an office of the DC-10 fleet without Payne present. (Pl.'s Ex. 5, Payne Dep. at 5, 71; Pl.'s Ex. 4, Yantiss Dep. at 16, 53.) Bailey also notes that Captain Traub testified that Bailey would be present at the Review, but that it is not disputed that Bailey was not in fact present. (Pl.'s Ex. 3, Traub Dep. at 18-19.) The record contains conflicting information as to whether Jim Underwood was at the Board of Review. Payne's July

notes include him in the list of those present, while the unsigned notes do not. (Compare Pl.'s Exs. 16 and 17.) Payne testified that he was certain that Underwood was on the Board, and Yantiss allegedly testified that Underwood may have been on the Review.[5] (Pl.'s Ex. 5, Dep. Payne at 70.) The depositions relied upon by Bailey were taken in August, 1999, more than six years after the Board of Review occurred.

The fatal problem with Bailey's argument that no Board of Review took place is that plaintiff fails to present a single argument concerning the substantive discussion by Board Members at the meeting. In other words, Bailey produces no disparate testimony over how the Board members perceived either Bailey's training progress or his abilities as a potential second officer. Bailey also presents no testimony, other than his own, that a Review was *not* held. Bailey's arguments essentially demonstrate that in depositions which were taken six years after the meeting, members could not recall nonmaterial details of the discussion, and that United failed to keep copious notes of the meeting. These deficiencies, however, fail to overshadow the very important fact that Payne's notes and deposition testimony in support thereof are entirely consistent with Bailey's file and training evaluations which are described below in detail.

As discussed above, Grimm's April 16th evaluation, even the "secreted" evaluation, rated Bailey's technical ability as "needs improvement." The simulator training records for Bailey from April 20 through April 29 reflect that on most days and in most of the executing SOP categories, Bailey received a rating of 3 ("Average") on a scale of 1 ("Unsatisfactory") to 5 ("Excellent"). (Def.'s Ex. 8.) Bailey did, however, receive a number of 1's and a few 2's. (Id.) Comments were made on those areas where Bailey received less than a rating of 3. Most of

[5] Plaintiff does not provide a page citation for the alleged testimony Yantiss.

Bailey's difficulties had to do with ground operations. The April 23rd entry reads: "[e]xtremely slow and unsure of proper techniques during non-standard and unusual operations." (Id.) Similarly, the April 27th entry reads: "Jim is still slow and appears unsure of how to deal with unusual or irregular problems during all phases of ground operations" and "with respect to ground systems and set-up, Jim was not up to speed on systems." (Id.) The last entry on April 28th reads: "[a]gain, not quite up to speed on system." (Id.) Joe Pierson was his instructor for nearly every training day. (Id.)

In further harmony with Payne's notes, Bailey's file also includes an evaluation from Heinz Rengel, dated May 6, 1993. (Def.'s Ex. 9.) Rengel, who was a fill-in Pilot Instructor on April 29, 1993, observed that Bailey showed "a general lack of SOPs," and that "[w]ith Irregular/Emergency procedures, [Bailey] elaborated on many steps during a checklist which led to confusion and improper execution of the steps required." (Id.) An April 27th evaluation rates Bailey's technical ability as 2.5, somewhere between "needs improvement" and "standard." (Pl.'s Ex. 14.) In most of the behavioral categories, Bailey received a rating of 3 ("standard"). (Id.) Bailey did receive a 2 ("needs improvement") in the area of planning/ organization and a rating of a 4 ("above standard") in "objectivity/motivation/industry." (Id.) On a more positive note, the evaluator, W.J. Pierson, commented that Bailey "has worked incredibly hard to master the DC-10, and he'll be a fine second officer for [United]." (Id.)

Perhaps most important and most consistent with Payne's findings is that on April 30, 1993, after receiving two additional training periods, Bailey failed his simulator check ride. His instructor, Joe Onodera, noted in the evaluation that Bailey failed to perform SOPs, failed to handle emergencies or critical irregularities, needed additional training in "engine start problems"

and "pneumatic system," and recommended at least two additional periods in the simulator.[6] (Def.'s Ex. 10). Bailey does not deny that he failed the simulation. In fact, Bailey testified that immediately after the check ride, he was informed by Onodera that he did not pass; Bailey further testified that he was quite upset at having failed the test because he was on probation. (Def.'s Ex. 1, Deposition Testimony of James Bailey ("Bailey Dep.") at 113).

United also submits an affidavit of Eric Clethen, who attests that he was a member of the Board of Review, held on May 4, 1993, which, after considering Bailey's employment and training, decided to terminate Bailey. (Def. Ex. 3 at ¶ 20). Clethen further attests that after the Board of Review's meeting, he "called Mr. Bailey, informed him of the Board's decision and asked him to travel to San Francisco on May 5, 1993 where he would be removed from United's payroll and offered the opportunity to resign in lieu of termination. Mr. Bailey was required to travel to San Francisco because that was his assigned domicile. Mr. Bailey informed me that he could not make a meeting on May 5th but would be available on May 6, 1993." (Id.)

Bailey likewise testified that he was commanded to report to San Francisco. (Def.'s Ex. 1, Bailey Dep. at 114, 123). In San Francisco, he met with Clethen, who gave Bailey the option of resigning upon the condition that he sign a release. (Id. at 115-16.) Bailey refused to sign the release. (Id.) The meeting, according to Bailey, was *pro forma*. (Id. at 15-16.) However, Bailey also met separately with Ed Daly, the Chief Pilot, who discussed in detail Bailey's training

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[6] Bailey also argues that he should survive summary judgment because Payne sought only negative information on Bailey in summarizing his notes. Bailey, however, points almost entirely to his training evaluations for his first pilot training as sources that should have been included. It is well settled, however, that prior good evaluations fail to establish that later unsatisfactory evaluations are pretextual. See Billet v. CIGNA Corp., 940 F.2d 812, 826 (3d Cir. 1991), abrogated on other grounds by, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517-18, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); Sosky v. International Mill Serv., Inc., No. Civ. A. 94-2833, 1996 WL 32139, at *8 (E.D. Pa. Jan. 25, 1996). He does complain that Payne did not contact his instructor Joe Pierson. While this may be true, Pierson's evaluation, as noted above, gave Bailey a 2.5 rating. While Pierson had a positive final comment, there is no evidence that Pierson's general evaluation of Bailey stands in contrast to Payne's findings in his summary report.

performance. (Id. at 116.) While Bailey testified that Daly "just didn't make sense what he was saying," Bailey was unable to describe in any coherent detail what about the conversation regarding Bailey's training did not make sense. (Id.) Thus, to be clear, Bailey testified that he was told in San Francisco that a Board of Review had convened and determined that Bailey would be discharged. He further testified that Daly reviewed Bailey's training history with Bailey "in detail." This testimony simply flies in the face of Bailey's current allegation that no Board convened.

In summary, Bailey's argument that the state of his employment file, in particular the "secreted" Grimm evaluation, the "untimely" Board of Review notes and the testimony concerning the particulars of the meeting, could lead a reasonable jury to find that United's articulated reason was pretextual fails in light of the entire record. Namely, viewing the evidence in the light most favorable to Bailey, United's articulated reason for discharging Bailey is wholly consonant with Bailey's training evaluations and the uncontested fact that Bailey failed his check ride. From the slight deficits in United's records and in the witness' memories of the particulars of events which occurred approximately six years prior, a reasonable juror could not infer that United's stated reason for firing Bailey was pretextual. Fuentes, 32 F.3d at 765. See also Martin v. Allegheny Airlines, Inc., 126 F. Supp. 2d 809, 818 (E.D. Pa. 2000) ("minor inconsistency does not rise to the level to persuade a jury that [defendant's] proffered reason lacks credence), aff'd, 261 F.3d 492 (3d Cir. 2001); Sosky v. International Mill Serv., Inc., No. Civ. A. 94-2833, 1996 WL 32139, at *7 (E.D. Pa. Jan. 25, 1996) (determining that defendant was mistaken in some criticisms, but concluding that these mistakes were not enough for plaintiff to meet pretext burden), aff'd, 103 F.3d 114 (3d Cir. 1996). I therefore conclude that Bailey's arguments concerning the state of his employment file coupled with the faded memories of certain Board

members fail to provide Bailey a defense to the motion for summary judgment as a matter of law.

Bailey also contends similarly situated employees were granted additional training opportunities which were denied to plaintiff. In order for employees to be deemed similarly situated, "the individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." Bullock, 71 F. Supp. 2d at 489 (citation omitted). See also Grande v. State Farm Mut. Auto. Ins. Co., 83 F. Supp. 2d 559, 565 (E.D. Pa. 2000). Comparators should have worked with the same supervisor, have been subject to the same standards, and have engaged in the same conduct. See Taylor v. Procter & Gamble Dover Wipes, 184 F. Supp. 2d 402, 410 (D. Del. 2002); O'Neill v. Sears, Roebuck and Co., 108 F. Supp. 2d 433, 439 (E.D. Pa. 2000); Grande, 83 F. Supp. 2d at 565.

Bailey brings forth eight airmen who appear to have been given more additional simulator sessions than Bailey. (Def.'s Exs. 21(b), (e)-(i); Pl.'s Ex. 20, Pl.'s Ex. 2 to Pl.'s Supp. Mem.) The fatal weakness in Bailey's argument is that none of these airmen had the same instructors or the same Board of Review members. Likewise, Bailey fails to compare the particular reasons that these airmen were granted additional training opportunities with the reasons that Bailey was not given such opportunities. See Pivirotto, 191 F.3d at 367 (highlighting that in a similarly situated analysis the focus is on "the particular criteria or qualifications identified by the employer as the reason for the adverse action."). United also points out that in each of these cases, where the airman failed the simulator check ride, the airman, like Bailey, was terminated. At least one airman was not even given the opportunity to take a check ride. (Def.'s Ex. 21(c).) It is also worth noting that during the years 1992-1997, 577 out of 584, approximately ninety-nine percent (99%), of United pilots who turned sixty and sought to continue with United as

second officers passed their second officer training. (Def.'s Ex. 22, Def.'s Answers and Objections to Interrogs. ¶ 6.)

Bailey also vigorously argues that he should have been allowed more training sessions because the Board rested its decision in large part on the fact that Bailey was given the "maximum" amount of training afforded. Bailey relies on the unsigned Board notes which read: "[Bailey] had reached the point of maximum training set for all probationary pilots." (Pl.'s Ex. 16.) The notes, however, include much more than this one phrase. It provides, *inter alia*, that Bailey was "very slow to pick up SOPs and flow patterns," that "[d]uring one engine fire, he became so flustered that he resorted to putting the captain's hand on the shut off lever rather than controlling out the checklist items," that "[h]e was the only S/O in the class, so he got more time at the panel than he normally would," and that "[d]uring an engine fire procedure, he did not detect that the Fire lights were still lit." Thus, the notes provide a wide number of reasons that the Board determined that Bailey should be terminated. This one possible misstatement of United's flight training is not enough for Bailey to meet his burden on proof that United's articulated reason for discharging Bailey is pretextual. See Fuentes, 32 F.3d at 765.

This Court is not permitted to second guess United's decision to terminate Bailey rather than to provide him with additional training sessions. See Fuentes, 32 F.3d at 765 ; Killen v. Marketing Communication Sys., Inc., No. Civ. A. 00-3812, 2001 WL 1486218, at *1 (E.D. Pa. Nov. 15, 2001); Ziegler v. Delaware County Daily Times, 128 F. Supp.2d 790, 811 (E.D. Pa. 2001); Hurst v. Jiffy Lube, No. Civ. A. 00-133, 2000 WL 1790112, at *4 (E.D. Pa. Dec. 6, 2000). Rather, Bailey must demonstrate that this decision was the result of intentional discrimination based on his age. This standard is especially true in this case where the decisionmakers must take into account substantial public safety concerns in each employment decision. See Murname

v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981); Ludwig v. Northwest Airlines, Inc., 98 F. Supp. 2d 1057, 1066 (D. Minn. 2000), aff'd, 2001 WL 10908 (8th Cir. Jan. 5, 2001), cert denied, 122 S.Ct. 48 (2001). I therefore conclude that Bailey has failed to establish any genuine issue of material fact exists as to whether similarly situated United employees were more favorably treated or whether United improperly relied on a mistaken belief that Bailey had been granted the "maximum" training time.

Bailey's final argument concerns stray ageist remarks in the workplace and related contentions. Specifically, Bailey contends that younger United employees refer to older pilots who have since become second officers as "herpes," intimating that "they never go away." (Dep. of Bailey at 62-63, 128; Pl.'s Ex. 3, Traub Dep. at 37; Pl.'s Ex. 4, Yantiss Dep. at 63-65.) Although Bailey asserts that he had "absolutely" heard the term "herpes" directed towards him, he could not identify a specific person who used the term and stated that it was directed at him only one or two times in a crew room by his co-workers. (Bailey Dep. at 62-63.) Bailey also claims that his instructor, Pierson, was "not professional and somewhat disrespectful" in his approach to Bailey's training.[7] (Bailey Dep. at 105-06.) This apparently was exhibited through Pierson's mannerisms and his comments, although Bailey could not recall a specific incident. (Id. at 96, 105.) Bailey also places great weight on a letter, dated March 8, 1989, written by then New Pilot Supervisor Doug Kuykendall, which reads: "In this business, the only thing better than having new (junior) pilots arriving is having old (senior) pilots leaving." (Pl.'s Ex. 6.) Plaintiff points to no evidence that Kuykendall's comment constituted company policy.

It is well-settled that stray remarks, such as the ones proffered by Bailey, by non-

[7] This is the same Pierson who Bailey thought that Payne should have contacted for more input in conjunction with the Board of Review.

decisionmakers or by decisionmakers unrelated to the decision process generally do not constitute direct evidence of discrimination, particularly if they were made temporally remote from the date of decision.'" Pivirotto, 191 F.3d at 359 (quoting Ezold, 983 F.3d at 545); Bullock, 71 F. Supp. 2d at 486; Armbruster v. Unisys Corp., 914 F. Supp. 1153, 1156 (E.D. Pa. 1996). Bailey fails to bring forth even a single statement made by any decision-maker at any time, let alone at a time in temporal proximity to May of 1993 when the termination decision was made. I therefore conclude that Bailey's purported evidence of direct discrimination fail as a matter of law.

IV. Conclusion

For the foregoing reasons, this Court concludes that no reasonable jury could, upon the evidence proffered by Bailey, find that he was discriminated against by his employer because of his age; thus, the motion of defendant for summary judgment will be granted. Bailey has purportedly gathered a litany of evidence showing weaknesses, inconsistencies, deficiencies and the like in United's stated reason for terminating him. While the list may be lengthy, it is not substantive when held up against Bailey's performance during his training as a second officer. Had Bailey's training record, for instance, been outstanding, then these deficiencies may have shed a different light on United's articulated reason. But such is not the case here where Bailey consistently struggled with certain portions of his training and ultimately failed his check ride. United is therefore entitled to judgment as a matter of law.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES BAILEY	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
v.	**:**	
	:	
UNITED AIRLINES	**:**	
Defendant.	**:**	**NO. 97-5223**

O R D E R

AND NOW on this 26th day of June, 2002, upon consideration of the motion of defendant United Airlines for summary judgment (Document No. 33), pursuant to Rule 56 of the Federal Rules of Civil Procedure, as well as the response, reply and supplemental briefs thereto, and having concluded for the reasons set forth in the foregoing memorandum that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law, it is hereby **ORDERED** that the motion is **GRANTED**.

JUDGMENT is hereby **ENTERED** in favor of United Airlines and against James Bailey.

This is a final order.

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LOWELL A. REED, JR., S.J.